IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-777

UNITED STATES OF AMERICA,

Petitioner,

vs.

KEITH CREWS,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

FRANK G. CARRINGTON, JR., ESQ.,
WAYNE W. SCHMIDT, ESQ.,
Americans for Effective Law
Enforcement, Inc.,
Suite 960,
State National Bank Plaza,
1603 Orrington Avenue,
Evanston, Illinois 60201,
Counsel for Amicus Curiae.

Of Counsel:
FRED E. INBAU, ESQ.,
Americans for Effective Law
Enforcement, Inc.,
JAMES P. MANAK, ESQ.,
National District Attorneys
Association, Inc.,
666 North Lake Shore Drive,
Suite 1432,
Chicago, Illinois 60611.

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Articles.

Miscellaneous.

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Solicitor General of the United States, counsel for the Petitioner, and by Mr. W. Gary Kohlman, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE.

I. General Interest of the Amicus Curiae.

American for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under

the laws of the State of Illinois. As stated in its by-laws the purposes of the AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime.

II. Specific Interest of the Amicus Curiae.

Our particular interest in this case arises from the fundamental and far-reaching policy issue involved—the articulation and protection of the legitimate interests and rights of the victims of crime in a Free Society.

It is our belief that the result reached by the court below totally fails to balance those interests against the rights of criminal defendants and that it has constructed a rule of law that is simply too high a price to pay in a Free Society for the minimal and incidental benefits of deterrence of unlawful police conduct derived from the application of the Fourth Amendment Exclusionary Rule—benefits that are speculative at best.

We believe that this case affords the Supreme Court of the United States an opportunity to provide a Free Society with the cornerstone in a Bill of Rights for the Victims of Crime—the right to testify in open court against their accused attackers; and the right to avail themselves of the criminal justice system

to redress wrongs done to them and the People of their State by criminal defendants.

In addition, we believe that the Fruit of the Poisonous Tree Doctrine does not apply to this case as a matter of law.

ARGUMENT.

I.

Introduction.

The respondent was seen by two District of Columbia Park Police officers near the Washington Monument a few days after a number of separate robberies in a restroom on the grounds of the Monument. He was stopped by these officers and asked his name and age, as well as why he was not in school, since it appeared that he was of high school age. He was also told that he fit the descriptions given by the robbery victims. Respondent was then permitted to go on his way. A tour guide then told the officers he thought he had seen the respondent in the area on the day of the first victim's attack.

At this, the officers stopped respondent a second time and called a District of Columbia police detective in charge of the robbery investigation. The detective arrived only a few minutes later and attempted to photograph respondent, but was unable to do so because of poor weather conditions.

The detective then took the respondent to Park Police Headquarters where he was photographed, interviewed and released. The next day the first victim identified the respondent's photograph from an array of eight pictures and later identified respondent in a police lineup.

The trial court suppressed the testimony of the victims pertaining to the photographic and lineup identifications, but allowed in-court identifications on the basis that they were not affected by the police conduct and were derived from seeing the respondent commit the crimes.

On appeal, the majority of a District of Columbia Court of Appeals panel held that the in-court identifications by the victims were not the result of exploiting the primary illegality of the arrest and that the Poisonous Tree Doctrine of *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920) and *Wong Sun* v. *U. S.*, 371 U. S. 471 (1963) does not apply. The Court concluded that "[o]n the facts of this case, such a price [application of the Doctrine] would be too high." It carefully examined the conduct of the police and made it clear that it did not present, "the sort of egregious misconduct the deterrence of which would warrant the extreme sanction of barring the in-court identification testimony of the victims."

A majority of the *en banc* District of Columbia Court of Appeals, however, reversed, rejecting application of the independent source and inevitable discovery exceptions of the Poisonous Tree Doctrine and ruling that the victims' in-court identifications should have been suppressed as the fruit of an unlawful arrest.

Thus, the *en banc* court has set the stage for what *amicus curiae* submits presents a fundamental conflict between the rights and interests of victims, and the rights of defendants, as set forth in the Specific Interest of Amicus Curiae, *supra*, and presents the Supreme Court of the United States with an appropriate vehicle for articulating and balancing the competing interests and rights involved.

II.

The Fruit of the Poisonous Tree Doctrine Does Not Apply to the Facts of This Case in View of the Lawfulness of the Detention and the Independent Source of the Identification.

As is our custom when appearing as *amicus curiae* before this Court, we will not reiterate at any length the legal arguments made by the Government in this case, although we are in complete accord with such arguments and wish to associate

ourselves with and express our complete support for them. We will, rather, address ourselves to the important policy issues raised by this case, and to the importance of such issues to the effectiveness of law enforcement, nationwide. That effectiveness is absolutely dependent upon the cooperation of the victims of crime, particularly as witnesses in court, without which law enforcement in a Free Society can not function.

Amicus, however, can not overlook certain legal issues that are as vital to law enforcement as the central policy issues themselves.

The first such issue is the legality of the respondent's initial detention and subsequent arrest. The initial stop and brief detention were based upon the fact that the respondent appeared to be a school truant and matched the description of the robber given by the robbery victims. *Amicus* submits that such detention was fully warranted as a proper police investigatory tool under the rule of *Terry* v. *Ohio*, 392 U. S. 1 (1968) and its derivatives in the state and federal courts. With the information then supplied by the tour guide to the effect that he believed the respondent was in the area on the day of the first victim's robbery, it is submitted that the sum total of the information possessed by the police officers rose to the level of probable cause to arrest.

The police were aware of (a) the facts of the crimes, (b) the descriptions of the person who had committed them, (c) the fact that respondent matched the descriptions, (d) the fact that respondent was plausibly placed at the scene of at least one of the robberies by a disinterested witness (the tour guide), and (e) the identities of the complaining witnesses—all before the second detention at the stationhouse where respondent's picture was taken. That second detention was rendered necessary by the completely fortuitous fact that weather conditions did not permit photographing of the respondent at the scene of the initial, lawful detention.

It is submitted that the stationhouse detention was based upon a valid arrest and that the evidence obtained thereby did not violate Fourth Amendment principles.

Even if it is concluded that the in-court identification of the respondent by the three witnesses was causually related to an unlawful arrest, it is submitted that the panel opinion of the court below was correct in finding an adequate independent source for the identification testimony. As that court noted, while the trial court had concluded that the officers lacked probable cause to detain respondent, their suspicions concerning his involvement in the robberies and as a truant were well founded and he was released soon after he had been photographed and it was determined that he was not a truant. His stationhouse detention was minimal—approximately one hour—and the identity of the victims was known. The illegality of the arrest would never have prevented the respondent's *prosecution* (*Frisbie* v. *Collins*, 342 U. S. 519 (1952) and *Ker* v. *Illinois*, 119 U. S. 436 (1886)), and there exist an infinite number of ways that this respondent could ultimately—and legally—have been confronted by his victims.

Rejection by the *en banc* court of the independent source and inevitable discovery exceptions to the Fruit of the Poisonous Tree Doctrine was totally unwarranted on the facts of this case and the precedent set here will render these ameliorative rules practically unavailable to the state and federal courts in most factual settings.

III.

The Suppression of the Voluntary Testimony of a Victim of a Crime Is Too High a Price to Pay for the Minimal and Incidental Benefits of Deterrence of Unlawful Police Conduct Derived from Application of the Fourth Amendment Exclusionary Rule.

This Court has in the past taken great pains to emphasize that the judicially constructed Fourth Amendment Exclusionary Rule is not aimed at redressing harms done to individuals as a result of constitutional errors of the police, but at deterring such errors for the protection of society as a whole. *Stone* v. *Powell*, 428

U. S. 465 (1977). Thus, the Court has in recent years examined each case individually in order to balance the probability of deterrence against the price paid by society and the victim by the penalty of exclusion. This Court, only last year, has made it clear that in some cases the price of exclusion is simply too high to pay.

In *United States* v. *Ceccolini*, 98 U. S. 1062 (1978) this Court ruled that the cost of permanently silencing a witness because of an illegal search was too great for an "even-handed system of law enforcement to bear in order to secure . . . a speculative and very likely negligible deterrent effect."

The instant case presents an even stronger reason to reject application of the Poisonous Tree Doctrine than was presented in *Ceccolini*, for *Ceccolini* involved the testimony of a mere disinterested witness, while this case presents the compelling desire of the *victim of a crime* to testify against her assailant.

If the innocent victim of a crime, whose independent ability to identify her assailant is undeniable, is to be deprived of her day in court simply because a police officer committed an error which the victim had nothing to do with and which did not lead to the discovery or seizure of any evidence admitted at the defendant's trial, this Court will have returned such persons to the world of "private remedies" that existed before the origins of our judicial system. The societal implications of such a ruling would cry out for questioning whether *any* interest of victims and society could *ever* hold sway against a mere judicially constructed rule of evidence such as the Poisonous Tree Doctrine.

IV.

The Result Reached by the Court Below Fails to Balance the Legitimate Interests and Rights of the Victims of Crime Against the Rights of Criminal Defendants.

In recent years our judicial system seems to have lost interest in the rights of victims and witnesses, perhaps because of its

pre-occupation with the task of moving the Bill of Rights into the Twentieth Century for criminal defendants. While this has been a salutory task to be sure, it was not one which called for pre-occupation to the total exclusion of other legitimate, competing interests. For, as this Court well-stated over 45 years ago in *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934):

> [J]ustice, through due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

No less a civil libertarian that Herbert Brownell, former United States Attorney General, addressed this current imbalance in his Second Annual Benjamin N. Cardozo lecture on March 4, 1976, entitled "The Forgotten Victims of Crime," reprinted in Forgotten Victims: An Advocate's Anthology, published by the California District Attorneys Association in 1977. While noting that in other legal systems, particularly those in Western Europe, victims can request to participate in the prosecution of the crime or to intervene to litigate a civil claim as part of the criminal action, Brownell observed that the victim in the United States lacks standing in a criminal action and is reduced to the status of a mere witness by the form of the action, brought in the name of the State or People. Brownell praised programs intended to alleviate the problems of victims in the criminal justice process, as worthwhile steps to restore the balance heralded by this Court in *Snyder:*

> Such a balance is vital to society as a whole. It is essential to the maintenance of public trust in the integrity and effectiveness of the judicial process. Its erosion is cause for great concern, because community cooperation and involvement are indispensible if the courts are to play their part in maintaining the social order. In a government of laws and a society of consent, such as our own, citizens have a fundamental responsibility to participate in the judicial process as jurors and witnesses. A system of laws that guarantees individual liberty and safety depends upon the support of citizens. It is, however, unrealistic to demand such support without offering reciprocal benefits. The courts

> have laid down rules to protect the person accused of crime, in the well-known *Miranda* case. What we need, for reasons I shall demonstrate shortly, is an informal *Miranda*-like program of actions designed to protect the crime victim in his role as complaining witness. Brownell, "The Forgotten Victims of Crime," Forgotten Victims: An Advocate's Anthology 8 (1977).

Others, too, have noted this imbalance, including the Federal Government which in recent years has funded the Commission on Victim Witness Assistance of the National District Attorneys Association (Grant 77 DF 99-0035, U. S. Department of Justice, Law Enforcement Assistance Administration) for the express purpose of providing solutions to the most cumbersome problems encountered daily by victims and witnesses involved in our judicial system: long delays, continuances, property return, transportation, restitution, to name a few. In its manifesto to that undertaking the National District Attorneys Association declared:

> Since its inception, the Commission on Victim Witness Assistance field units have strived to accommodate and facilitate the needs of those forgotten persons in our criminal justice system—the victims and witnesses . . .
>
> It has been the intention of the National District Attorneys Association to treat victims and witnesses as humans with personal feelings and not a piece of evidence to be used and later discarded. We hope that through the services our units have and continue to provide and those we have outlined in our publications, that your program will attain the goals and objectives you have set forth. Preface, The Victim Advocate, National District Attorneys Association (1978).

Amicus curiae notes this trend and return to a concern for the rights of victims with approval and submits that rejection by this Court of the tortured application of the Exclusionary Rule by the *en banc* decision below will enhance the restoration of the balance heralded by *Snyder*. Our request is not to ignore the Fourth Amendment rights of defendants. But, within the confines of the Exclusionary Rule and its sub-doctrines, and keeping in mind

that the Rule was judicially constructed to ultimately serve society's interest in deterrence of police misconduct, not to redress wrongs done to defendants, we feel there is adequate room to strike the balance.

Silencing the victims of crime and preventing them from gaining access to the courts and the criminal justice process will further delay the restoration of that balance. In striking that balance in this case the Court will put our priorities in a rational order.

> A shift in priorities is long overdue. There must be a greater concern for the victims of crime. Furthermore, this can be done without disregarding those rights of suspected or accused persons that are designed as safeguards for the protection of the innocent; there need not be callousness toward all offenders. Some, especially the youthful first offenders, may well be deserving of compassion, rather than confinement in penal institutions. Nowhere in the delineation process, however, should we overlook the essential duty to protect potential victims. California District Attorneys Association, "Victim Rights Litigation," Forgotten Victims: An Advocate's Anthology 131 (1977).

CONCLUSION.

The efforts of law enforcement officers nationwide to deal with the problems of crime and lawlessness depend upon the cooperation of willing victims and witnesses to avail themselves of the criminal justice process in reporting crimes and testifying in court. The time has arrived to recognize the legitimate interests and rights of victims and witnesses. The suppression of the voluntary testimony of such persons, with all of its ramifications and implications, is indeed too high a price to pay for the continued application of the Fourth Amendment Exclusionary Rule.

Respectfully submitted,

FRANK G. CARRINGTON, JR., ESQ.,
WAYNE W. SCHMIDT, ESQ.,
Americans for Effective Law
Enforcement, Inc.,
Suite 960,
State National Bank Plaza,
1603 Orrington Avenue,
Evanston, Illinois 60201,
Counsel for Amicus Curiae.

Of Counsel:

FRED E. INBAU, ESQ.,
Americans for Effective Law
Enforcement, Inc.,

JAMES P. MANAK, ESQ.,
National District Attorneys
Association, Inc.,
666 North Lake Shore Drive,
Suite 1432,
Chicago, Illinois 60611.